UMW Equipment Sdn Bhd v Parantaman Ramasamy & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1021 OF 2009
LOW HOP BING, ABU SAMAH AND ALIZATUL KHAIR JJCA
13 FEBRUARY 2014

Administrative Law — Judicial review proceedings — Grounds for — Whether decision not justified on facts — Whether irrelevant matters taken into consideration or relevant matters disregarded — Facts found by Industrial Court not supporting its conclusion that employee dismissed without just cause or excuse — Perverse finding — Judicial review allowed

Labour Law — Employment — Dismissal — Respondent dismissed for coming to work late on nine occasions — Final warning given to respondent for earlier similar misconduct — Whether punishment of dismissal for coming to work late too harsh — Whether dismissal without just cause or excuse

The first respondent ('the respondent') was employed with the appellant as a Warranty Claims Manager. He was dismissed by the appellant on 1 September 1998 after a domestic enquiry found him guilty of three charges of misconduct. The first charge against the respondent was for coming to work late on ten occasions. The second charge was for leaving office early without permission on eight occasions. The third charge was for being absent without authorisation on eight occasions. The Industrial Court found that the second and third charges had not been proven. It however found that the first charge had been proven based on the respondent's own admission. Despite this, the Industrial Court held that the respondent was dismissed without just cause or excuse and that the punishment of dismissal for coming to work late was too harsh despite the final warning given to the respondent after he was found guilty of similar charges of misconduct in an earlier domestic enquiry. The High Court dismissed the appellant's application for judicial review to quash the decision of the Industrial Court. Whilst the High Court found that the Industrial Court had taken into account irrelevant factors and that it was the management's prerogative to regulate rules in matters of discipline, nevertheless the High Court justified the decision of the Industrial Court on the ground that only one charge was proved against the respondent whilst the other charges were not proven. The appellant appealed against the decision of the High Court.

Held, allowing the appeal with costs:

(1) The decision of an inferior tribunal is amenable to judicial review where

the facts do not justify the decision or where the findings of the Industrial Court are arrived at by taking into consideration irrelevant matters or disregarding relevant matters (see para 15); *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 referred.

(2) The Industrial Court's conclusion that the respondent had been dismissed without just cause or excuse could not stand in the wake of its own finding that the charge for coming to work late on nine occassions had been proved. The facts as found by the Industrial Court did not support its own conclusion. It was a perverse finding to exculpate the appellant who had admitted to the charge against him (see para 19).

(3) The High Court had committed an error of law in affirming the decision of the Industrial Court notwithstanding its own findings that the Industrial Court had taken into consideration irrelevant matters in holding that the respondent had been dismissed without just cause or excuse (see para 20).

(4) The facts showed that this was not the first time that the respondent had been brought before the domestic enquiry for similar misconduct. The first domestic enquiry which was held on 20 April 1998 found the respondent guilty of five charges of misconduct but the appellant decided to give him another opportunity by giving him a final warning that any further act of misconduct and infringement of the appellant's rules and regulations would result in termination of service. The respondent had been issued with warning letters relating to his discipline and punctuality. Verbal warning had also been given to him in the past. Past misconduct is a relevant factor in determining whether the punishment is harsh or otherwise (see para 22); *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204; *Kamala Loshanee a/p Ambalavanar v Jaffnese Co-Operative Society* [1998] 7 MLJ 61 referred.

[Bahasa Malaysia summary

Responden pertama ('responden') bekerja dengan perayu sebagai Pengurus Tuntutan Waranti. Dia dibuang kerja oleh perayu pada 1 September 1998 selepas siasatan domestik mendapati dia bersalah terhadap tiga tuduhan salah laku. Tuduhan pertama terhadap responden adalah kerana lewat datang bekerja sebanyak 10 kali. Tuduhan kedua adalah kerana meninggalkan pejabat awal tanpa mendapat kebenaran sebanyak lapan kali. Tuduhan ketiga adalah kerana tidak datang bekerja tanpa kebenaran sebanyak lapan kali. Mahkamah Perusahaan mendapati bahawa tuduhan kedua dan ketiga tidak dibuktikan. Ia walau bagaimanapun mendapati bahawa tuduhan pertama telah dibuktikan berdasarkan atas pengakuan responden sendiri. Walaupun demikian, Mahkamah Perusahaan memutuskan bahawa responden dibuang kerja tanpa alasan dan sebab adil dan bahawa hukuman pembuangan kerja kerana lewat

datang berkerja adalah terlalu keras walaupun amaran terakhir diberikan kepada responden selepas dia didapati bersalah atas tuduhan salah laku yang sama dalam siasatan domestik sebelumnya. Mahkamah Tinggi menolak permohonan perayu untuk semakan kehakiman untuk membatalkan keputusan Mahkamah Perusahaan. Sementara Mahkamah Tinggi mendapati bahawa Mahkamah Perusahaan telah mengambil kira faktor-faktor tak relevan dan ia adalah prerogatif pengurusan untuk mengawal selia peraturan-peraturan dalam perkara disiplin, walau bagaimanapun Mahkamah Tinggi menjustifikasikan keputusan Mahkamah Perusahaan atas alasan bahawa hanya satu tuduhan dibuktikan terhadap responden sementara tuduhan-tuduhan lain tidak dibuktikan. Perayu merayu terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Keputusan tribunal rendah adalah terbuka kepada semakan kehakiman di mana fakta tidak menjustifiskasikan keputusan atau di mana dapatan-dapatan Mahkamah Perusahaan dicapai dengan mengambil pertimbangan perkara yang tak relevan atau tidak mengambil kira perkara relevan (lihat perenggan 15); *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 dirujuk.

(2) Keputusan Mahkamah Perusahaan bahawa responden telah dibuang kerja tanpa alasan dan sebab adil tidak dapat bertahan dalam dapatannya sendiri bahawa tuduhan untuk lewat datang berkerja sebanyak sembilan kali telah dibuktikan. Fakta seperti yang didapati oleh Mahkamah Perusahaan tidak menyokong keputusannya sendiri. Ia adalah dapatan salah untuk membebaskan perayu yang telah mengaku kepada tuduhan (lihat perenggan 19).

(3) Mahkamah Tinggi telah melakukan kesilapan undang-undang dalam mengesahkan keputusan Mahkamah Perusahaan meskipun dapatannya sendiri bahawa Mahkamah Perusahaan telah mengambil pertimbangan perkara tak relevan dan memutuskan bahawa responden telah dibuang kerja tanpa alasan atau sebab adil (lihat perenggan 20).

(4) Fakta menunjukkan bahawa ini bukanlah kali pertama responden telah dibawa ke hadapan siasatan domestik untuk salah laku yang sama. Siasatan domestik pertama yang mana telah diadakan pada 20 April 1998 mendapati responden bersalah terhadap lima tuduhan salah laku tetapi perayu memutuskan untuk memberi dia peluang sekali lagi dengan memberi dia amaran terakhir bahawa apa-apa tindakan selanjut salah laku dan pelanggaran kaedah-kaedah dan peraturan-peraturan akan mengakibatkan penamatan perkhidmatan. Responden telah diserahkan surat-surat amaran berkaitan disiplin dan menepati masanya. Amaran lisan juga diberikan kepadanya pada masa lepas. Salah laku pada masa dulu adalah faktor relevan dalam menentukan sama ada hukuman adalah

keras atau sebaliknya (lihat perenggan 22); *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204; *Kamala Loshanee a/p Ambalavanar v Jaffnese Co-Operative Society* [1998] 7 MLJ 61 dirujuk.]

Notes

For a case on judicial review proceedings, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 390.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1078–1149.

Cases referred to

Ashbridge Investments v Minister of Housing and Local Government [1965] 3 All ER 371, CA (refd)

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141, HL (refd)

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129, FC (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687, FC (refd)

Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor [2009] 6 MLJ 402, CA (refd)

Kamala Loshanee a/p Ambalavanar v Jaffnese Co-Operative Society [1998] 7 MLJ 61, HC (refd)

Mak Sik Kwong v Minister of Home Affairs, Malaysia (No 2) [1975] 2 MLJ 175 (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204; [1988] 1 CLJ (Rep) 183, SC (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd)

Non-Metallic Mineralproducts Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd [1976] 2 MLJ 67, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257, FC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753, FC (refd)

Appeal from: Application for judicial review No R5-(R3)–25–364 of 2006 (High Court, Kuala Lumpur)

A Ramadas (M Jothilachimy with him) (Ramadas & Assoc) for the appellant.
Harpal Singh (Lua Ai Siew with him) (AJ Ariffin, Yeo and Harpal) for the respondent.

Abu Samah JCA (delivering judgment of the court):

[1] This appeal originated from a claim in the Industrial Court for reinstatement by an employee ('the respondent') against his employer ('the appellant') for alleged wrongful dismissal by the latter. In this judgment, reference to the word 'respondent' means the first respondent. The second respondent is only a nominal respondent. The respondent started work with the appellant in 1981 as a sales executive. In 1995, he was promoted as a sales manager. He was dismissed by the appellant on 1 September 1998 after a domestic enquiry ('second enquiry') held on 11 August 1998 found him guilty of three charges of misconduct. At the time of his dismissal the respondent's post was redesignated as warranty claims manager.

[2] The first charge against the respondent was for coming to work late on occassions in June and July 1998. The second charge was for leaving office early without permission on eight occassions in June and July 1998. The third charge was for being absent without authorisation on eight occassions in June and July 1998. The fourth charge was for failure to produce medical certificates for 7 and 10 July 1998, which he claimed that he was on medical leave. The domestic enquiry decided in his favour in respect of the fourth charge.

[3] In the Industrial Court, the respondent claimed that he was victimised and dismissed by the appellant without just cause or excuse. In his evidence before the Industrial Court he pointed out several instances of victimisation which were however denied by the appellant. He claimed that he was traumatised when his position as a sales manager was redesignated as a warranty claims manager, which was, to him, a demotion.

[4] The Industrial Court found that the charges for leaving office early without permission, for being absent without authorisation and for not producing medical certificates on the days the respondent was on medical leave had not been proven. It however found that the charge against the respondent for coming to work late on nine occassions (excluding 1 June 1998) in June and July 1998 had been proven based on the respondent's own admission. This was what the Industrial Court said:

> The charge of coming to work late on nine occassions in June and July 1998 has been proved based on the claimant's admission that he came to work late on the days stated in co-22 except for 1 June 1998 when he was still on suspension.

[5] Despite the abovesaid finding and the respondent's own admission to the charge for coming late to work, the Industrial Court came to the conclusion that the respondent was dismissed without just cause or excuse. The Industrial Court was of the opinion that the punishment of dismissal for coming to work late 'was too harsh despite the final warning' given to the respondent after he was found guilty of similar charges of misconduct in an earlier domestic enquiry which preceded the second enquiry. The first enquiry was held on 20 April 1998. The justification given by the Industrial Court was that on the days he was late to work in June and July 1998, he was late by a few minutes on four occassions and by less than thirty minutes on another four occassions. On one occasion, he was late by one hour twenty-one minutes. Understandably, the appellant was upset with the decision that the respondent was dismissed without just cause or excuse, notwithstanding the latter's own admission to the charge for coming to work late. It then applied to the High Court for an order of certiorari to quash the decision of the Industrial Court.

[6] The High Court dismissed the appellant's application for judicial review to quash the decision of the Industrial Court with costs notwithstanding that the charge against the respondent for coming to work late on nine occassions in June and July 1998 had been proven.

[7] The learned judicial commissioner ('JC'), in dismissing the application for judicial review, agreed with the appellant's contention that the Industrial Court took into account irrelevant factors and that it was the management's prerogative to regulate rules in matters of discipline but it justified the decision of the Industrial Court on the ground that only one charge was proved against the respondent whilst the other charges were not proven. For convenience, we reproduce what the learned JC said in her grounds of judgment:

> Saya bersetuju dengan hujahan pemohon bahawa dengan mempersoalkan keperluan Responden mengetip kad perakam waktu, mempersoalkan keperluan Responden datang ke pejabat dahulu, bahawa kredit harus diberi kepada Responden untuk penjualan earth moving equipment dan pemohon perlu menetapkan target kepada Responden, *Pengerusi itu telah mengambil kira faktor-faktor yang tidak relevan* kepada isu yang dibicarakan iaitu sama ada Responden datang lambat, balik cepat dan tidak datang kerja tanpa kebenaran. Pihak pengurusan pemohon berhak membuat peraturan berkaitan disiplin pekerja. Lagipun Responden bukan lagi bekerja sebagai Pengurus Pemasaran yang memerlukan beliau berjumpa pelanggan. (Emphasis added.)

[8] The main ground of appeal by the appellant was that the High Court committed a glaring error of law in affirming the decision of the Industrial Court despite acknowledging that the Industrial Court took into account irrelevant matters in arriving at its decision and that it was the management's prerogative to regulate rules relating to employees' discipline (*Hoh Kiang Ngan*

v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687, *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748.

[9] The respondent contended that the appeal was essentially on concurrent findings of facts which should not be disturbed (*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd* [2003] 3 MLJ 257) and that there is a presumption that the High Court judge had rightly exercised her discretion (*Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor* [2009] 6 MLJ 402).

[10] The appeal by the appellant against the decision of the High Court did not involve any novel or difficult issue of law relating to judicial review. As in most cases of wrongful dismissal, it turned on the application of settled principles of law to the facts of each particular case. Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at p 154 stressed that, 'Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of powers, be itself guilty of usurping power'.

[11] It was held in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 (SC) that judicial review is not an appeal but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

[12] The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. The Federal Court in *Non-Metallic Mineral Products Manufacturing Employees Union v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 had made it clear that the Industrial Court is charged with findings of fact and 'unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its findings of facts'. Mohd Azmi FCJ in delivering the judgment of the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 reaffirmed the principle that in exercising judicial review the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did or that the decision of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them.

[13] The Federal Court in that case approved what it had previously said in *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 where Raja Azlan Shah CJ said:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[14] The court can interfere on the ground that the decision maker had acted on no evidence or had come to a conclusion which on evidence it could not reasonably come (*Malayan Banking Bhd v Association of Bank Officers, Penisular Malaysia & Anor* [1988] 3 MLJ 204; [1988] 1 CLJ (Rep) 183); *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 3 All ER 371. That was, in general, the state of the law until 1997 when the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 held that the decision of an inferior tribunal may be reviewed on the grounds of illegality, irrationality and possibly proportionality, thus allowing the courts to scrutinise the decision not only for process but also for substance.

[15] It is now settled that the decision of an inferior tribunal is amenable to judicial review where the facts do not justify the decision or where the findings of the Industrial Court are arrived at by taking into consideration irrelevant matters or disregarding relevant matters. The Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 had the occasion to revisit the decision in *R Rama Chandran* and after referring to the cases before and after the decision in *R Rama Chandran* unanimously concluded that the decision of an inferior tribunal is amenable to judicial review where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters or disregarding relevant matters.

[16] Raus Sharif FCJ (as he then was), in delivering the judgment of the Federal Court said:

> It is clear from the above authorities that the scope and ambit of Rama Chandran had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at

A by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review. (See para 19)

B **[17]** We agreed with learned counsel for the appellant that the High Court had in its grounds of judgment acknowledged that the Industrial Court had taken into account irrelevant matters but fell into error in affirming the decision of the Industrial Court. Like the Industrial Court, the High Court disregarded the fact that the respondent admitted to the charge of coming late C to office. The primary function of the Industrial Court is to determine whether the misconduct or irregularities complained of had in fact been committed, and if so, whether such grounds constitute just cause or excuse for the dismissal (*Wong Yuen Hock*, *Milan Auto Sdn Bhd v Wong Seh Yen and another appeal* [1995] 3 MLJ 537; [1995] 4 CLJ 449).

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[18] Jurisdiction to issue certiorari is supervisory and the court does not sit as an appellate authority and will not review merely an erroneous finding of facts unless completely unsupported by evidence which then is regarded as an error E of law. (*Mak Sik Kwong v Minister of Home Affairs Malaysia (No 2)* [1975] 2 MLJ 175).

[19] In this case the respondent did in fact commit the acts as alleged in the first charge. Could it then be said that he was dismissed without just cause or F excuse?. In our judgment the Industrial Court's conclusion that the respondent had been dismissed without just cause or excuse could not stand in the wake of its own finding that the charge for coming to work late on nine occassions in June and July 1998 had been proved. The facts as found by the Industrial Court did not support its own conclusion. It was a perverse finding to exculpate the G appellant who had admitted to the charge against him.

[20] It is manifestly obvious from the judgment of the High Court that it had committed an error of law in affirming the decision of the Industrial Court notwithstanding its own findings that the Industrial Court had taken into H consideration irrelevant matters in holding that the respondent had been dismissed without just cause or excuse. An inferior tribunal has no jurisdiction to commit an error of law. If it does make such an error, it exceeds its jurisdiction.

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[21] In *Hoh Kiang Ngan*, the Federal Court agreed with the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 3 MLJ 317; [1995] 2 CLJ 918 on what constitute an error of law:

> But it may safely be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant consideration or omits to take into account relevant consideration (what may be conveniently termed as an Anisminic error) or if he misconstrues the terms of any relevant statutes, or misapplies or misstates a principle of the general law. Since an inferior Tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

[22] As far as punishment was concerned, the facts showed that this was not the first time that the respondent had been brought before the domestic enquiry for similar misconduct. The first domestic enquiry which was held on 20 April 1998 found the respondent guilty of five charges of misconduct but the appellant decided to give him another opportunity by giving him a final warning that any further act of misconduct and infringement of the appellant's rules and regulations would result in termination of service. The judgment of the Industrial Court shows that the respondent had been issued with warning letters relating to his discipline and punctuality even before the first enquiry was held. Verbal warning had also been given to him in the past. Learned counsel for the appellant submitted that the misconduct which preceded the second enquiry was the proverbial straw that broke the camel's back leaving the appellant with no choice but to terminate his employment upon the respondent being found guilty of the charges against him. Past misconduct is a relevant factor and the Industrial Court, had in the past, taken into consideration in determining whether the punishment is harsh or otherwise (see *Malayan Banking Bhd v Association of Bank Officers, Peninsula Malaysia & Anor*, and Industrial Court cases cited in *Kamala Loshanee a/p Ambalavanar v Jaffnese Cooperative Society* [1998] 7 MLJ 61).

[23] In the result, we allowed the appeal by the appellant with costs and set aside the decision of the High Court.

Appeal allowed with costs.

Reported by Kanesh Sundrum